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Decision 92-01-014 January 10, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

Application of Pacific Gas and Electric Company for an order approving settlement of a complaint case brought by Dexzel, Inc., and amendment of the long-term Energy and Capacity Power Purchase Agreement between Pacific Gas and Electric Company and Dexzel, Inc.	Application 91-03-049 (Filed March 21, 1991)
Dexzel, Inc., a corporation, Complainant, vs. Pacific Gas and Electric Company, a corporation, Defendant.	Case 90-07-068 (Filed July 27, 1990)

O P I N I O N

1. Summary

Pacific Gas & Electric Company (PG&E) has filed a petition for modification of Decision (D.) 91-06-050. In D.91-06-050, we approved a settlement agreement and mutual release (settlement agreement) which would amend the Interim Standard Offer 4 Power Purchase Agreement (PPA) between PG&E and Dexzel, Inc. (Dexzel).

PG&E requests that D.91-06-050 be modified to assure PG&E of rate recovery for payments made in accordance with the amended PPA. For the reasons stated below, we modify D.91-06-050 to clarify that the pricing provisions pursuant to which PG&E will make payments to Dexzel under the amended PPA are reasonable, and therefore are recoverable from ratepayers without further reasonableness review by this Commission. However, we make this

simultaneously to deliver the specified amount of firm capacity continuously into PG&E's system as required by the PPA.

On July 27, 1990, Dexzel filed Complaint 90-07-[illegible] alleging, among other things, (a) that its facility qualified for a firm capacity rating of 29 megawatts effective February 20, 1990; (b) that PG&E owed Dexzel firm capacity payments based on a firm capacity rating of 29 megawatts going back to February 20, 1990; (c) that Dexzel was entitled to interest on the capacity payments withheld by PG&E and (d) that PG&E breached its duty to act toward Dexzel in good faith.

2.2 The Settlement Agreement

In August 1990, the parties executed an interim agreement regarding firm capacity payments which was to remain in effect pending resolution of the complaint case. Pursuant to this interim agreement, PG&E agreed to pay Dexzel for firm capacity based on PG&E's estimated firm capacity rating of 27.5 megawatts. The parties then engaged in further settlement negotiations which produced the settlement agreement submitted for our approval in Application (A.) 91-03-049. The settlement is based on Dexzel's intention not to operate EOR during peak demand periods. In return for PG&E's recognition of February 20, 1990, as the firm capacity availability date and its agreement to make firm capacity payments based on 29 megawatts subject to the terms and conditions of the PPA, as amended by the settlement agreement, Dexzel promised not to conduct EOR operations during the on-peak and partial-peak hours of PG&E's peak summer months (currently June, July and August) and during the on-peak and partial-peak hours of the nine remaining months of the year.

The settlement agreement also contains verification guarantees and penalties designed to monitor Dexzel's compliance with the above described restrictions. Specifically, Dexzel is obligated to report each month to PG&E every half hour period when Dexzel conducts EOR operations during an on-peak or partial-peak

CORRECTION

THIS DOCUMENT HAS BEEN REPHOTOGRAPHED TO ASSURE LEGIBILITY

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modification with the proviso that PG&E's payments to Dexzel must be made in accordance with the terms of the amended settlement agreement and PPA. The Commission will retain authority to audit payments after the fact to ascertain that the contract is prudently administered by PG&E and that it is consequently reasonable for PG&E to be reimbursed by its ratepayers.

2. Background

2.1 The Controversy

A summary of the underlying dispute, which we set forth in more detail in D.91-06-050, is as follows. Dexzel operates a 29 megawatt natural gas-fired combined cycle enhanced oil recovery (EOR) cogeneration facility near Bakersfield, California. This facility first delivered energy to PG&E on November 30, 1989, pursuant to an Interim Standard Offer PPA.

The PPA provides that PG&E's obligation to pay for firm capacity begins on the date firm capacity is available. The PPA defines the date that firm capacity is available as the day following the day the facility demonstrates to PG&E's satisfaction that it is capable of operating simultaneously to deliver firm capacity continuously into PG&E's system. To satisfy this criterion, PG&E requires the qualifying facility (QF) (in this case Dexzel) to take a firm capacity demonstration test (FCDT).

On February 20, 1990, Dexzel took a FCDT. Dexzel conducted the test without simultaneously conducting EOR operations in the oil fields adjacent to its facility, since it did not intend to conduct EOR operations during any on-peak hours of any summer month. In March, 1990, PG&E began paying Dexzel for energy delivery. However, PG&E disputed the validity of Dexzel's FCDT, questioning the impact that the EOR operations might have on the facility's electrical output. PG&E therefore asserted that Dexzel's FCDT was invalid and Dexzel was not entitled to payments for firm capacity because Dexzel had not demonstrated to PG&E's satisfaction that the facility was capable of operating

simultaneously to deliver the specified amount of firm capacity continuously into PG&E's system as required by the PPA.

On July 27, 1990, Dexzel filed Complaint 90-07-068 alleging, among other things, (a) that its facility qualified for a firm capacity rating of 29 megawatts effective February 20, 1990; (b) that PG&E owed Dexzel firm capacity payments based on a firm capacity rating of 29 megawatts going back to February 20, 1990; (c) that Dexzel was entitled to interest on the capacity payments withheld by PG&E and (d) that PG&E breached its duty to act toward Dexzel in good faith.

2.2 The Settlement Agreement

In August 1990, the parties executed an interim agreement regarding firm capacity payments which was to remain in effect pending resolution of the complaint case. Pursuant to this interim agreement, PG&E agreed to pay Dexzel for firm capacity based on PG&E's estimated firm capacity rating of 27.5 megawatts. The parties then engaged in further settlement negotiations which produced the settlement agreement submitted for our approval in Application (A.) 91-03-049. The settlement is based on Dexzel's intention not to operate EOR during peak demand periods. In return for PG&E's recognition of February 20, 1990, as the firm capacity availability date and its agreement to make firm capacity payments based on 29 megawatts subject to the terms and conditions of the PPA, as amended by the settlement agreement, Dexzel promised not to conduct EOR operations during the on-peak and partial-peak hours of PG&E's peak summer months (currently June, July and August) and during the on-peak and partial-peak hours of the nine remaining months of the year.

The settlement agreement also contains verification guarantees and penalties designed to monitor Dexzel's compliance with the above described restrictions. Specifically, Dexzel is obligated to report each month to PG&E every half hour period when Dexzel conducts EOR operations during an on-peak or partial-peak

period.[1] If Dexzel conducts EOR operations during any half hour interval of the proscribed periods of one of the peak summer months, PG&E's firm capacity payment to Dexzel for that entire month will be based on 27.5 megawatts, rather than 29 megawatts. If Dexzel conducts EOR operations during any half hour period of the proscribed period of the remaining nine months of the year, PG&E's firm capacity payment to Dexzel will be based on 27.5 megawatts for those proscribed hours during which Dexzel conducted EOR operations. In addition to these penalties, Dexzel's conduct of EOR operations during a proscribed period gives PG&E the right to curtail certain of its energy deliveries from Dexzel during off-peak and super off-peak periods.

2.3 D.91-06-050

PG&E filed A.91-03-049 requesting that the Commission approve the settlement agreement entered into by PG&E and Dexzel. In D.91-06-050, we approved the settlement agreement. We noted that the Division of Ratepayer Advocates (DRA) had reviewed the complaint, the application and settlement agreement, and had recommended approval of the settlement, subject to later Commission review of its obligations and the exercise of its rights under the PPA and settlement agreement. We also stated that PG&E agreed to this modification.

2.4 PG&E's Petition For Modification of D.91-03-050

On July 16, 1991, PG&E filed a petition for modification of D.91-03-050. PG&E requests that D.91-03-050 be modified to assure PG&E of rate recovery for payments made in accordance with the amended PPA, subject to reasonableness review of PG&E's administration of the agreement in its Energy Cost Adjustment

1 Under the settlement, PG&E has the right to verify Dexzel's reporting by inspecting Dexzel's facilities and reviewing its records.

Clause (ECAC) proceeding. PG&E argues that utility purchases of QF power under a standard offer PPA are per se reasonable and recoverable in rates without ECAC review. PG&E seeks the same assurances for this amended PPA. PG&E cites several cases in which PG&E contends utilities sought and obtained the Commission's advance approval of nonstandard agreements. PG&E states that unless D.91-03-050 is modified, PG&E may be forced to let the settlement agreement lapse and return the matter to the complaint proceeding.

DRA has filed a timely protest to PG&E's petition for modification, stating that D.91-03-050 is consistent with previous Commission decisions, and that therefore, the petition should be denied. DRA argues that in prior decisions approving the terms of PPAs, the Commission has approved the terms of contracts and has consistently reserved the right to assess the reasonableness of subsequent contract administration in ECAC proceedings, which includes an evaluation of whether payments were properly made in accordance with contract terms. DRA further argues that although the terms of standard offer contracts may not be reviewable in ECAC proceedings, payments are still subject to review to make sure that they were properly made in accordance with the approved contracts.

3. Discussion

D.91-06-050 approved the settlement agreement between PG&E and Dexzel. The issue presented by PG&E's petition for modification is whether D.91-03-050 should be modified to clarify that it not only approves the settlement between PG&E and Dexzel under Article 13.5 of our Rules, but also contains a specific determination of reasonableness of the pricing provisions of the amended PPA which would foreclose any future objection to the recoverability of the renegotiated contract payments by the utility from its ratepayers.

In Malacha Hydro Limited Partnership v. Pacific Gas and Electric Company (Malacha), D.91-07-054, slip, 12, we articulated the distinction between these two issues.

> "Consistent with Rule 51.8, in D.91-02-044 the Commission held that 'the settlement of a complaint does not entitle the utility to a reasonableness determination of the expenses borne under the terms of the settlement or a revised power purchase agreement.' Thus, the two questions are entirely independent of one another, and different standards apply. Whereas Commission approval of a settlement under Article 13.5 is an official affirmation which would give the Commission power within the limits of its jurisdiction to enforce the agreement between the parties, a reasonableness determination forecloses any future objection to the recoverability of renegotiated contract payments by the utility from its ratepayers." (Citations omitted.)

In Malacha, slip, 12, we stated that insulation of the renegotiated contract terms from future Commission review is consistent with the conceptual underpinnings of the Standard Offer. We explained that since Standard Offers were developed as a package, these contracts as a whole were considered reasonable to ratepayers and "automatic approval of those terms by the Commission was guaranteed." However, since modified PPA's change the terms of the Standard Offers, we reasoned that these modifications must be reviewed by this Commission in order "to insure that ratepayers receive 'commensurate concessions.'" (Id. at 13.)

In Malacha, we stated that our Guidelines for Contract Administration of Standard Offers permit parties to negotiate modifications to their Standard Offer 4 contracts to settle a dispute. We recognized that "if the modification of the contract results in aggregate payments with a net present value equal to or greater than that which would be received under the unamended contract, it is presumptively reasonable" if accompanied by price or performance concessions which are commensurate in value.

(Id. at 17.) We reasoned that this presumption applies because the original Standard Offer contract is presumptively reasonable. (Id.)

In this case, the settlement agreement does not increase the payment provisions of Dexzel's Standard Offer PPA. Moreover, the settlement agreement provides for Dexzel's additional performance guarantees, and heightened verification provisions designed to monitor Dexzel's compliance. In D.91-06-050, slip, 5, we discussed the benefits of the settlement agreement to ratepayers. The agreement provides, among other things, for Dexzel's increased performance commitments, and provides PG&E with the ability to monitor Dexzel's compliance. If Dexzel violates restrictions on EOR operations, it shall be subject to capacity payment reduction and economic curtailment penalties. We also noted that DRA recommended approval of the settlement, subject to later Commission review of the reasonableness of PG&E's performance and administration of its obligations and the exercise of its rights under the PPA and settlement agreement, to which recommendation PG&E has agreed.

DRA believes that the enforcement provisions of the settlement agreement provide a strong incentive to Dexzel to deliver 29 megawatts of firm capacity as provided by the PPA and that those provisions protect the ratepayers. Based on the recommendations of DRA, and our review of the settlement agreement and its underlying documents, we also find the contract provisions governing payments to be made by PG&E are reasonable for ECAC purposes.

However, in the underlying application and this petition for modification, we have not been given any detail on any past or future payments which have or will be made pursuant to the amended PPA. Therefore, we grant the modifications set forth below with the proviso that PG&E's payments to Dexzel must actually be made in accordance with the terms of the amended PPA. This means that the

Commission retains authority to audit the history of payments after the fact (including any payments made to date) to ascertain that the amended contract is prudently administered by PG&E and that it is consequently reasonable for PG&E to be reimbursed by its ratepayers. Thus, although this decision holds that the payment provision terms of the amended PPA are not further reviewable in ECAC proceedings, payments are still subject to review to ensure that they are properly made in accordance with the approved contracts.

A copy of the Order of D.91-06-050, as modified by this decision, is attached as Appendix A.

Findings of Fact

1. D.91-06-050 approved the Settlement Agreement and Mutual Release between PG&E and Dexzel which amended their Interim Standard Offer 4 PPA.

2. PG&E filed a Petition for Modification of D.91-06-050, to assure PG&E of rate recovery for payments made in accordance with the settlement agreement and the Interim Standard Offer 4 PPA to which it relates, as amended consistent with the settlement agreement (amended PPA), subject to reasonableness review of PG&E's administration of the agreement in its Energy Cost Adjustment Clause proceeding.

Conclusions of Law

1. PG&E's petition for modification is granted to the extent set forth below.

2. Finding of Fact 3 of D.91-06-050 is modified as follows: The pricing provisions of the settlement agreement and the Interim Standard Offer 4 power purchase agreement to which it relates, as amended consistent with the settlement agreement (amended PPA) are not subject to further reasonableness review by this Commission, but the Commission retains authority to ascertain that the amended PPA is being administered prudently and that any past or future payments are made in accordance with the amended terms thereof.

3. Finding of Fact 4 of D.91-06-050 is deleted.

4. Paragraph 2 of the Order in D.91-06-050 is modified as follows: The pricing provisions of the settlement agreement and the Interim Standard Offer 4 power purchase agreement to which it relates, as amended consistent with the settlement agreement (amended PPA), are reasonable. PG&E is entitled to recover all payments made pursuant thereto through PG&E's Energy Cost Adjustment Clause proceeding, or any other mechanism the Commission may establish which provides for full recovery of such payments.

5. Paragraph 3 of the Order in D.91-06-050 is modified as follows: The recovery of payments (whether past or future payments) made by PG&E under the amended PPA is subject to Commission review of the reasonableness of PG&E's performance and administration of its obligations and exercise of its rights under the amended PPA.

6. A new Paragraph 4 of the Order in D.91-06-050 is added as follows: The Commission's approval of the settlement is final and not subject to further reasonableness review, except as otherwise provided herein.

7. Paragraph 4 of the Order in D.91-06-050 is renumbered to Paragraph 5.

8. Since the order in D.91-06-050 was effective on the date of its issuance, this order is effective today.

O R D E R

IT IS ORDERED that:

1. Finding of Fact 3 of Decision (D.) 91-06-050 is modified as follows: The pricing provisions of the settlement agreement and the Interim Standard Offer 4 power purchase agreement to which it relates, as amended consistent with the settlement agreement (amended PPA), are not subject to further reasonableness review by this Commission, but the Commission retains authority to ascertain

that the amended PPA is being administered prudently and that any past or future payments are made in accordance with the amended terms thereof.

2. Finding of Fact 4 of D.91-06-050 is deleted.

3. Paragraph 2 of the Order in D.91-06-050 is modified as follows: The pricing provisions of the settlement agreement and the Interim Standard Offer 4 power purchase agreement to which it relates, as amended consistent with the settlement agreement (amended PPA), are reasonable. PG&E is entitled to recover all payments made pursuant thereto through PG&E's Energy Cost Adjustment Clause proceeding, or any other mechanism the Commission may establish which provides for full recovery of such payments.

4. Paragraph 3 of the Order in D.91-06-050 is modified as follows: The recovery of payments (whether past or future payments) made by PG&E under the amended PPA is subject to Commission review of the reasonableness of PG&E's performance and administration of its obligations and exercise of its rights under the amended PPA.

5. A new Paragraph 4 of the Order in D.91-06-050 is added as follows: The Commission's approval of the settlement is final and not subject to further reasonableness review, except as otherwise provided herein.

6. Paragraph 4 of the Order in D.91-06-050 is renumbered to Paragraph 5.

7. Except as modified herein, D.91-06-050 shall remain in effect.

This order is effective today.

Dated January 10, 1992, at San Francisco, California.

DANIEL Wm. FESSLER
President
JOHN B. OHANIAN
PATRICIA M. ECKERT
NORMAN D. SHUMWAY
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

NEAL J. SHULMAN, Executive Director

APPENDIX A

The Order in D.91-06-050, as amended by today's decision, is set forth below:

O R D E R

IT IS ORDERED that:

1. The Settlement Agreement and Mutual Releases dated as of November 30, 1990 between Dexzel, Inc., and Pacific Gas and Electric Company (PG&E) are approved.

2. The pricing provisions of the settlement agreement and the Interim Standard Offer 4 power purchase agreement to which it relates, as amended consistent with the settlement agreement (amended PPA), are reasonable. PG&E is entitled to recover all payments made pursuant thereto through PG&E's Energy Cost Adjustment Clause proceeding, or any other mechanism the Commission may establish which provides for full recovery of such payments.

3. The recovery of payments (whether past or future payments) made by PG&E under the amended PPA is subject to Commission review of the reasonableness of PG&E's performance and administration of its obligations and exercise of its rights under the amended PPA.

4. The Commission's approval of the settlement is final and not subject to further reasonableness review, except as otherwise provided herein.

5. C.90-07-068 is dismissed with prejudice.

6. Except as modified herein, D.91-06-050 shall remain in effect.

This order is effective today.

(END OF APPENDIX A)